No. 90-569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

N.A.A.C.P. DETROIT BRANCH, *et al.*,
Petitioners,

v.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA), *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS CITY OF DETROIT, MAYOR COLEMAN A. YOUNG, THE DETROIT POLICE DEPARTMENT, CHIEF OF POLICE WILLIAM L. HART, AND THE DETROIT BOARD OF POLICE COMMISSIONERS IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals correctly held that operation of a *bona fide* seniority rule in connection with layoffs of public employees does not violate the Equal Protection Clause of the United States Constitution.

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PRELIMINARY STATEMENT

Respondents City of Detroit, Mayor Coleman A. Young, the Detroit Police Department, Chief of Police William L. Hart, and the Detroit Board of Police Commissioners (referred to herein as the "City Defendants") submit this brief in opposition to the petition for a writ of certiorari.[1]

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[1] Respondents Detroit Police Officers Association ("DPOA") and David Watroba are separately represented.

COUNTERSTATEMENT OF THE CASE

Plaintiffs, a class of black police officers, maintain this employment discrimination suit under 42 U.S.C. § 1983, claiming that their layoffs by the Detroit Police Department in 1979 and 1980 were unconstitutional. The layoffs were made pursuant to a collectively-bargained rule of inverse seniority under which officers most recently hired were first laid off.

The District Court, in an opinion dated July 25, 1984, held the layoffs unconstitutional in that they reduced the level of black representation among police officers and thereby violated what the District Court found to be Detroit's "affirmative duty" to eliminate the effects of past discrimination. *NAACP v. Detroit Police Officers Ass'n*, 591 F.Supp. 1194 (E.D. Mich. 1984) (A. 1, 14-15).[2] The District Court held the layoffs unconstitutional notwithstanding findings (1) that the layoffs were made in response to a budgetary crisis (A. 8); (2) that the inverse seniority provision pursuant to which the

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[2] Shortly after taking office, Detroit Mayor Coleman A. Young, in 1974, initiated affirmative action measures, including minority recruiting and race-conscious promotions, to increase black representation at all levels of the police department (A. 8).

In a separate suit, maintained by a group of white officers challenging Detroit's affirmative action promotions to the rank of police lieutenant, the District Court credited evidence—offered by Detroit in defense of its use of race-conscious measures—that the Department had intentionally discriminated against blacks in police hiring up to the years 1967-68. *Baker v. City of Detroit*, 483 F. Supp. 930, 992 (E.D. Mich. 1979), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *modified*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). The Court held that Detroit had a compelling interest in eliminating remaining effects of its pre-1968 past discrimination which warranted its use of race-conscious promotion measures.

The class of black officers affected by Detroit's 1979 and 1980 layoffs were hired between 1975 and 1978 (A. 8); no evidence was presented that any of them had been a victim of the past discrimination established in the *Baker/Bratton* litigation (A. 32).

layoffs were made was *bona fide* (A. 39, 52); and (3) that the layoffs occurred without "racial animus" on the part of the City Defendants (A. 17).

The Court of Appeals, in a decision dated April 9, 1990, *NAACP v. DPOA*, 900 F.2d 903 (6th Cir. 1990) (A. 94), rejected the Plaintiffs' constitutional claim.[3] It held that § 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), immunizes the operation of Detroit's *bona fide* seniority rule from constitutional, as well as statutory, attack (A. 108, *et seq.*)

REASONS FOR DENYING THE WRIT

I. THE ASSERTED CONFLICT AMONG THE COURTS OF APPEALS IS NON-EXISTENT

The Courts of Appeals have for years consistently upheld the operation of "last hired-first fired" seniority rules which typically govern employee layoffs, in both public and private employment, against challenges asserted not only under Title VII but also under 42 U.S.C. § 1981 and 42 U.S.C. § 1983 that such rules perpetuate the effects of past hiring discrimination. *See Watkins v. United Steelworkers Local 2369*, 516 F.2d 41, 43-52 (5th Cir. 1975 (§ 1981 and Title VII); *Jersey Central Power & Light Co. v. Electrical Workers, IBEW*, 508 F.2d 687, 705-06 (3rd Cir. 1975) (Title VII); *Waters v. Wisconsin Steel Works of Int'l Harvester*, 502 F.2d 1309, 1318-20 & n.4 (7th Cir. 1974) (§ 1981 and Title VII); *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976) (§§ 1981 and 1983 and Title VII).

In *Chance*, which challenged layoffs of minority public employees on *constitutional* as well as statutory grounds, the Second Circuit stated: "That plaintiffs . . . are pro-

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[3] The intervening procedural history between the 1984 and 1990 decisions—including a 1987 remand decision by the Court of Appeals (A. 57) and ensuing decisions of the District Court in 1988 (A. 67, 87)—is described by the Court of Appeals at A. 96-100.

ceeding under 42 U.S.C. §§ 1981, 1983 does not render defendants' seniority system any more susceptible to attack." 534 F.2d at 998.[4] *See Firefighters, Inc. for Racial Equality v. Bach*, 731 F.2d 664, 666 n.2 (10th Cir. 1984) ("None of the other statutes cited by Plaintiffs [42 U.S.C. §§ 1981, 1983, 2000d] authorize any remedies in excess of those available under Title VII"); *Whiting v. Jackson State University*, 616 F.2d 116, 122 n.3 (5th Cir. 1980) ("No chameleon-like change in the nature of the relief is experienced simply because it is sought under sister provisions in the federal statutes.") *See also Fiesel v. Bd. of Educ. of New York*, 524 F. Supp. 48, 50 (E.D.N.Y. 1981), *aff'd*, 675 F.2d 522 (2d Cir. 1982); *Stokes v. New York Department of Correctional Services*, 569 F. Supp. 918, 922-25 (S.D.N.Y. 1982).

The Petition incorrectly asserts conflict between the Court of Appeals' decision and *Morgan v. O'Bryant*, 671 F.2d 23, 28 (1st Cir. 1982), and *Arthur v. Nyquist*, 712 F.2d 816, 822 (2d Cir. 1983), two suits by school children and their parents complaining of racially-segregated, public schools. Neither case remotely suggests that the operation of a *bona fide* seniority provision would be susceptible to constitutional challenge in the context of an employment discrimination suit; as explained below, *Arthur* clearly disclaims such a suggestion. Both cases upheld district court orders requiring that layoffs be made—notwithstanding collectively-bargained, inverse seniority rules—on a racially-proportionate basis in aid of school desegregation decrees. Both decisions made plain that curtailment of the non-minority teachers' seniority rights was warranted only by the need to vindicate the rights of the

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[4] Petitioners' own parenthetical description of *Chance*—as a case where there was no claim that the employer's layoff plan was itself discriminatory—reflects the *lack* of distinction between *Chance* and this case. *See* Petition at 9, n.19, *quoting, Chance, supra*, 534 F.2d at 999. Here also, as the Court of Appeals observed (A. 107), Petitioners have not contested the *bona fides* of Detroit's layoff provision at any stage of the litigation.

minority children and parents to a fully-desegregated education.[5]

The Second Circuit in *Arthur* made plain that a layoff remedy curtailing seniority rights of non-minority employees could not be sustained in the context of an employment discrimination suit consistent with *Chance*. It stressed that the layoff question in *Chance*, where it reversed such a remedy, arose "solely in the context of employment discrimination", *Arthur, supra*, 712 F.2d at 822 n.5, and that *Chance*, albeit maintained under §§ 1981 and 1983 was "therefore *analogous to a Title VII suit and not a school desegregation case.*" (Emphasis added).

There is no conflict with *Morgan* and *O'Bryant*. Petitioners' § 1983 claim is obviously controlled by *Chance* and the host of other decisions in employment discrimination cases which uphold the operation of *bona fide* seniority rules governing employee layoffs in public and private employment alike.

II. THE COURT OF APPEALS' DECISION IS WHOLLY CONSISTENT WITH PRIOR DECISIONS OF THIS COURT

The Court of Appeals' decision in this case accords with prior decisions of this Court.

This Court since 1977 has held repeatedly that § 703 (h) of Title VII affirmatively protects the application of *bona fide* seniority provisions. *See, e.g., Teamsters v. United States*, 431 U.S. 324 (1977); *Trans World Airlines,*

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[5] The First Circuit emphasized that "the victims here are the black school children, not the possible hiring discriminatees" and that the court orders were designed "to make the school children whole." *Morgan, supra*, 671 F.2d at 27. Likewise, the Second Circuit stated that the district court had authority to curtail seniority rights of the non-minority teachers "in order to vindicate the constitutional rights of the minority children . . . ." *Arthur, supra*, 712 F.2d at 822, n.5.

Inc. v. Hardison, 432 U.S. 63, 79 (1977); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75-76 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273, 277 (1982). As the Court of Appeals observed, "[l]ittle would be left of *Teamsters* if the results of the normal operation of a concededly bona fide seniority system could establish racial discrimination" in violation of the Constitution (A. 108).

The Court of Appeals' decision that operation of a *bona fide* seniority provision does not violate § 1983 also follows necessarily from this Court's holdings that discriminatory intent is an essential element of any claimed violation of the Equal Protection Clause. *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metro. Hsg. Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Personnel Adm. of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). The District Court's finding that the layoffs challenged here occurred pursuant to the application of *bona fide* seniority, and its refusal to ascribe racially-discriminatory animus to Detroit and its officials, necessarily preclude a determination that the layoffs violated the Constitution.

In *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), this Court held:

> Title VII precludes a district court from displacing a non-minority employee with seniority under the contractually established seniority system absent either a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy was necessary to make whole a proven victim of discrimination . . . .

Id. at 576, n.9. The Court declared that "the City [of Memphis] *could not be faulted* for following the seniority plans expressed in its agreement with the Union." *Id.* at 577 (emphasis added). The Court of Appeals in this case correctly determined that the operation of the "seniority provision [here] . . . must be upheld for the same reasons." (A. 110).[6]

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[6] This understanding of *Stotts* was reenforced by opinions in *Local 28 of Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986). In Section

The Court of Appeals' decision also accords with this Court's decision in *United States v. Paradise*, 480 U.S. 149, 107 S. Ct. 1053 (1987), on which Petitioners mistakenly rely (*see* Petition at 9, n.19). This Court in *Paradise* held that a one-for-one promotion requirement to redress past and present discrimination against black state troopers in Alabama withstood strict scrutiny under the Fourteenth Amendment. As observed by the Court of Appeals, the racial preference in *Paradise* in no way implicated the operation of any *bona fide* seniority rule and moreover operated in *promotions* not *layoffs* (A. 110, n.7). Justice Brennan's plurality opinion specifically stated that the "one-for-one requirement does not *require the layoff* and discharge of white employees and therefore *does not impose burdens of the sort that concerned the plurality in Wygant* . . . ." *Id.* at 1073 (emphasis added). Similarly Justice Powell's concurrence distinguished the impact of a racial preference in promotions from that in connection with layoffs. 107 S.Ct. at 1076.

In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), this Court overturned as unconstitutional a provision preserving minority representation incident to layoffs which had been mutually agreed upon in collective bargaining.[7] *Wygant*—which Petitioners fail to mention

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IV-D of his opinion for a plurality of the Court, Justice Brennan recalled the holding in *Stotts* that modification of the consent decree to preclude the operation of *bona fide* seniority violated § 703(h) of Title VII which " 'permits the routine application of a seniority system absent proof of an intention to discriminate.' " *Sheet Metal Workers, supra*, 478 U.S. at 472, quoting *Stotts, supra*, 467 U.S. at 577. Justice Brennan explained: "Since the District Court had found that the proposed layoffs were not motivated by a discriminatory purpose, we held that the court erred in enjoining the city from applying its seniority system in making the layoffs." 478 U.S. at 472. *See also* 478 U.S. at 499 (White, J., concurring generally in Section IV-D of Justice Brennan's plurality opinion).

[7] The District Court's 1984 decision was grounded in part on its pre-*Wygant* view that a minority retention rule, if agreed upon through collective bargaining, would be lawful and constitutional (A. 53).

—casts doubt on whether any preferential layoff provision could be sustained.[8] Petitioners' claim—that the City Defendants violated the Constitution by failing to abrogate the *bona fide* seniority rule provided in their collective bargaining agreement—is squarely contrary to the views stated by Justice Powell for the *Wygant* plurality and is also plainly contrary to the rationale of the *Wyant* dissenters.

The fact that Detroit's basis for making race-conscious promotions had been sustained in the *Baker/Bratton* litigation neither required nor permitted Detroit to abrogate its *bona-fide* seniority rule governing layoffs. In its 1987 remand decision, the Court of Appeals stated:

> The Court in *Bratton* did not impose a legal duty on the City to hire or retain the particular employees being laid off here. Judicial approval of a voluntary affirmative action plan does not create a contract of permanent employment or invalidate or modify a collective bargaining agreement providing for layoffs on the basis of seniority.

NAACP v. DPOA, 821 F.2d 328, 331 (6th Cir. 1987) (A. 62).

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[8] Justice Powell's plurality opinion concluded that minority retention provisions are not sufficiently narrowly-tailored to pass constitutional muster. 476 U.S. at 269, 282-83. *See* 476 U.S. at 295 (White, J., concurring in the judgment). Justice O'Connor's concurring opinion left open the "troubling question" whether any minority retention provision could be sustained. 476 U.S. at 284, 293-94.

The dissenting opinions emphasize the minority-retention provision's adoption in collective bargaining. *See* 476 U.S. at 295, 311 (Marshall, J., dissenting); 476 U.S. at 313, 317-18 (Stevens, J., dissenting). Justice Marshall emphasized that *Wygant* was "not a case in which a party to a collective-bargaining agreement *has attempted unilaterally to achieve racial balance by refusing to comply with a contractual, seniority-based layoff provision.*" 476 U.S. at 300 (emphasis added). Nothing in the *Wygant* dissents suggests receptivity to the entirely-novel contention of Petitioners here that Detroit violated the Constitution by *refraining* from just such a unilateral abrogation of its contractual seniority provision.

The Court of Appeals' decision that the City Defendants did not violate the Constitution by making layoffs pursuant to a *bona fide* seniority rule is consistent with the decisions of this Court and other Courts of Appeals and in no way warrants this Court's review.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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